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No. 80-1173

in the Supreme Court of the United States

October Term, 1980

J.F. HOFF ELECTRIC COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD AND LOCAL UNION 323, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Respondents

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR LOCAL UNION 323, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS IN OPPOSITION

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QUESTION PRESENTED

Whether the Board properly found that the Union did not violate Section 8(b)(4)(B) of the National Labor Relations Act by picketing at a common construction site gate through which supplies were delivered for the sole use of the employer with which the Union had a primary labor dispute.

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OPINIONS BELOW

The opinion of the Court of Appeals, reproduced in the Petitioner's Appendix at pages 1-39 is not yet reported. The decision of the National Labor Relations Board is reported at 241 NLRB No. 98 and is found in Petitioner's Appendix at pages 40-61.

JURISDICTION

The judgment of the Court of Appeals was entered on September 12, 1980. On December 1, 1980, Chief Justice Warren F. Burger extended the time within which to file a petition for a writ of certiorari to and including January 12, 1981. The petition was filed on January 9, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Federal Statute involved is the National Labor Relations Act, Section 8(b)(4), 29 U.S.C. §158(b)(4), and appears in the Petitioner's Appendix at pages 62-64.

STATEMENT

The Respondent adopts and incorporates herein by reference the Statement of this case as set forth by the National Labor Relations Board in its Brief in Opposition of February, 1981.

ARGUMENT

The Intervenor accepts the position and argument of the National Labor Relations Board in opposition to review of this case. Additionally, Respondent takes this opportunity to address the question presented by the Petitioner concerning the application and interpretation of the major judicial decisions governing construction site picketing. Respondent will show that the neutrality of construction contractors, pronounced in *Denver Building Trades*, applies exclusively to those employers and employees who share the common construction site as their business location. The status of suppliers is markedly different, and their protection from secondary boycott effects is determined in line with the *General Electric* and *Carrier Corporation* decisions. As discussed below, the decision of the Court of Appeals is fully consistent with these landmark cases. Moreover, the ruling in this case is not in conflict with any other circuits.

I. A SUPPLIER TO A CONSTRUCTION SITE EMPLOYER IS NOT AN INDEPENDENT CONTRACTOR WITHIN THE MEANING OF *DENVER BUILDING TRADES*

The decision of the Court of Appeals has correctly resolved the narrow issue in this case by applying settled principles approved by this Court. Contrary to the Petitioner's dire predictions, there is no precedent here that modifies or in any way contradicts previous rulings of this Court or of the Court of Appeals.

Petitioner's main contention, that the Court of Appeals circumvented the meaning of *Denver Building*

Trades,[1] is drawn from the suppositions of Judge Wilkey in dissent:

> Consolidated seems to be an independent contractor within the *Denver Building* rule, because it has a separate arrangement to provide materials to the owner of the construction project on which Hoff works, an arrangement contracted for before Hoff was selected as the electrical subcontractor. On the other hand, Consolidated seems to be a supplier of Hoff within the *General Electric* rule, since the lighting fixtures it provides are installed by Hoff's electricians.[2]

The statement that "Consolidated seems to be an independent contractor within the *Denver Building* rule" is unfounded. Yet, it is the heart of Petitioner's argument before this Court that the Court of Appeals should have looked to *Denver Building Trades* in resolving its quest as to who is a supplier or customer of a picketed primary construction contractor.[3] In fact, the District of Columbia Court of Appeals looked to *Denver Building Trades* but found no guidance:

> We can thus find in *Denver Building* no abiding principle to control this case. The decision does not answer the question of who is a

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[1]*NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675 (1951).

[2]Pet. App. 24.

[3]Pet. 14.

customer or supplier of a primary employer; it simply held that not all contractors on a construction project can be considered the same employer for the purposes of picketing and strikes.

* * *

. . . Although *Denver Building* stands for the proposition that mere co-existence on a common situs as independent subcontractors for a common contractor does not automatically provide sufficient work relatedness to justify picketing of *all* subcontractors, as agents, employees, or suppliers of the main contractor, it does not deal with the question of the permissible scope of picketing when one subcontractor delivers goods to a job site to be used solely by another subcontractor who is the primary employer.[4]

The Court of Appeals properly disavowed the notion that "suppliers" or "customers" constitute independent contractors merely because they deliver supplies to a job situs with construction contractors. Typically, at a construction site the primary employer performs distinct work and has a separate complement of employees working in close proximity to neutral employees of other construction contractors. This can be termed the "horizontal" organization of employers at a job site, including all contractors whose work or business is at the job site. *Denver Building Trades* accords these construction contractors and their employees the protection of neutrality in the event a labor dispute

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[4]Pet. App. 12-13 (original emphasis).

involves another contractor. The fact that subcontractors work side by side and are ultimately dependent on one another "does not eliminate the status of each as independent contractors or make the employees of one the employees of the other".[5] It is not disputed that a union which has a dispute with a non-union contractor violates Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. §158(b)(4), if it pickets employees or suppliers of another construction contractor.

However, in addition to the integrated, horizontal work structure which was the subject of *Denver Building Trades*, there are "vertical" lines of operation to each contractor at the common construction site. Suppliers and delivery companies, each with their own work force, provide certain materials and products to be used by particular contractors. Also, there may be several customers, such as the owner or developer which is the customer of the general contractor.

This is, in simple format, the scheme of operations at construction sites, with various subcontractors working together, each using the materials of its craft, which materials are provided by the contractor's supplier. This vertical or supply structure was not addressed by *Denver Building Trades.*

In the view of the Petitioner, outside suppliers and customers approaching or entering upon the common situs are forever insulated as independent contractors, regardless of whether they make deliveries to, or contract for purchases with, the primary employer. There is not

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[5]*NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675, 689.

even a passing phrase in *Denver Building Trades* to support this enlarged ban on primary activity. In that case this Court reserved the protection for neutral employers to on-site construction contractors and, by reference to *NLRB v. International Rice Milling Co.*,[6] drew the line at suppliers and customers:

> The conduct which the Board here condemned is readily distinguishable from that which it declined to condemn in the *Rice Milling* case *ante*, page 665. There, the accused union sought merely to obtain its own recognition by the operator of a mill, and the union's pickets near the mill sought to influence two employees of a customer of the mill not to cross the picket line. In that case we supported the Board in its conclusion that such conduct was no more than was traditional and permissible in a primary strike. The union did not engage in a strike against a customer. It did encourage concerted action by the customer's employees to force the customer to boycott the mill. It did not commit any unfair labor practice proscribed by §8(b)(4).[7]

The NLRB and the courts have uniformly applied *Denver Building Trades* to construction contractors whose business is performed at the common situs, and

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[6] *NLRB v. International Rice Milling Co.*, 341 U.S. 665 (1951).

[7] *NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675, 687-88.

not to customers or suppliers.[8] In *Building and Construction Trades Council of New Orleans (Markwell & Hartz, Inc.)*[9] the Board confirmed the view that various construction contractors on a common situs, involved in a common enterprise, were independent neutral employers for the purposes of Section 8(b)(4) of the Act. However, the Board also noted the special case of suppliers and deliverymen:

> We do not regard, as unlawful, Respondent's picketing prior to November 16, as it was on that date that the respective neutral gates were first marked to preclude use by persons making deliveries to M & H. Although a common situs problem is presented where a gate is reserved for both neutral subcontractors and persons making deliveries to a construction subcontractor, a balance of the competing interests underlying §8(b)(4)(B) requires our respecting the traditional right of labor organizations to appeal to such deliverymen as a lawful incident of legitimate strike action against the primary employer. [Retail Fruit and Vegetable Clerks Union] (Crystal Palace Market), 116 NLRB 856 [enf. 249 F.2d 591, (CA 9 1957)][10]

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[8] *Local 55 (PMB)*, 108 NLRB 363, enf. 218 F.2d 226 (CA 10 1954); *Hermandad de Trabajadores de la Construction (Levitt Corp.)*, 127 NLRB 900 (1960); *Local 978, Carpenters v. Markwell*, 305 F.2d 38 (CA 8, 1962); and *T. W. Hegelson, Inc. v. Ironworkers*, 548 F.2d 175 (CA 7, 1977).

[9] *Building and Construction Trades Council of New Orleans (Markwell & Hartz, Inc.)*, 155 NLRB 319 (1965), enf. 387 F.2d 79 (5th Cir. 1967), cert. den. 391 U.S. 914 (1968).

[10] *Id.*, p. 499 (emphasis added).

In *Local 978, Carpenters v. Markwell*,[11] the union's picket line was honored by employees of various suppliers and consequently deliveries to the primary employer ceased. The struck employer relied principally on *Denver Building Trades* to claim that its suppliers were protected as neutral employers. However, the Court of Appeals rejected the theory that because the supplier made deliveries to a common situs shared by construction contractors that the supplier thereby became a common situs neutral employer. The critical factor is not the picketing of the supplier at the point of delivery or entrance to the construction site, but whether the picketing extends past the delivery of supplies at the job site so as to put pressure on the supplier beyond its relationship with the primary employer. The Court held that the job site picketing of the supplier was a traditional primary appeal to suppliers of the primary employer:

> In our view, *Labor Board v. Rice Millng Co., supra*, 341 U.S. 665, is persuasive authority for the conclusion that defendants did not engage in secondary activities. We recognize that in *Rice Milling* the Supreme Court emphasized that the union did not engage in *concerted* activities; nevertheless, the situs of the picketing was not ignored. Thus, the Court stated, 341 U.S. at p. 671:
>
> 'There was no attempt by the union to induce any action by the employees of the neutral customer which would be more widespread than that already described. There

[11] *Local 978, Carpenters v. Markwell*, 305 F.2d 38 (CA 8, 1962).

were no inducements or encouragements applied elsewhere than on the picket line . . .'[12]

In this case, the Board and the Court of Appeals determined, as a practical matter, that Consolidated Electric Supply Company was a supplier of Hoff Electric and not an independent contractor within the meaning of *Denver Building Trades.* To hold otherwise, that is, to advance Petitioner's argument, would outlaw a union's traditional right to appeal to suppliers and deliverymen to honor a strike or picket line against the primary employer.

In *United Steelworkers v. NLRB (Carrier Corp.)*[13] this Court soundly rejected such a prohibition on primary activity:

> The primary strike, which is protected by the proviso, is aimed at applying economic pressure by halting the day-to-day operations of the struck employer. But Congress not only preserves the right to strike; it also saves 'primary picketing' from the secondary ban. Picketing has traditionally been a major weapon to implement the goals of a strike and has characteristically been aimed at all those approaching the situs whose mission is *selling,*

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[12]*Id.*, p. 45 (original emphasis).

[13]*United Steelworkers v. NLRB (Carrier Corporation)*, 376 U.S. 492 (1964).

delivering or otherwise contributing to the operation which the strike is endeavoring to halt.[14]

Real differences between suppliers and contractors do not allow them to be grouped together as neutral independent contractors. Any work performed by a deliveryman at the construction site is only the final act of delivery. The final delivery of supplies is a small portion of the supplier's business which is based off the construction site. The likely effect of picketing at the delivery point is only to turn away the driver while allowing the off-site, that is "home site", of the supplier to continue in operation. The business of a construction contractor, on the other hand, is on the common situs. An appeal to his employees could shut down the contractor's entire operation. Despite the proximity and work interrelatedness of crafts at a construction project, the different subcontractors are not, in the normal usage, "selling, delivering, or otherwise contributing to the operation which the strike is endeavoring to halt".[15] The employees of a primary employer, its suppliers and customers, have a more vital and direct association with the primary employer. Indeed, the contribution of labor, supplies and sales to customers is the daily subsistence of the primary employer's business.

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[14] *Id.*, p. 499 (emphasis added).

[15] *Id.*

II. THE COURT OF APPEALS DID NOT APPLY THE "WORK RELATEDNESS" TEST FROM *GENERAL ELECTRIC* TO IDENTIFY WHO IS A SUPPLIER BUT FOLLOWED "THE INTENDED USE" STANDARD DERIVED FROM *CARRIER CORPORATION*

The discussion raised by the Petitioner as to the applicability of the *General Electric* "work relatedness" test[16] to construction sites is distantly removed from the facts and issues of this case. The Court of Appeals in this case neither employed, nor relied upon, the *General Electric* "work relatedness" test. The union's picketing appeal to Consolidated was found to be protected because Consolidated was identified as a supplier of Hoff, the primary employer. The lower court adopted the principle of *Carrier Corporation* that picketing "aimed at all those approaching the situs whose mission is selling, delivering or otherwise contributing to" the operations of the primary employer is traditional, protected activity. In contrast, the "work relatedness" test is applied to independent, on-site, contractors who

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[16]In *General Electric*, the legality of picketing appeals to neutral on-site employees at a reserve gate rested upon whether the neutrals alone used the gate and, if so, whether they were employed in operations related to the normal business operations of the struck primary employer (e.g., maintenance services) or whether the neutral employees performed functions not related to the everyday operations of the primary employer (e.g., construction or capital improvements). Picketing at a reserve gate is unlawful when the gate is only used by neutral employees whose duties on the job site are not related to the normal operations of the primary employer. This test is used for neutral employers on the common situs. *See McLeod v. Local 459, IUE*, 338 F.Supp. 1051 (SDNY 1972).

share a common situs. Since Consolidated was never entitled to the independent neutral status of an on-site contractor, it is difficult to follow Petitioner's argument that the Court of Appeals stripped Consolidated of its *Denver Building Trades* neutrality by applying a "work relatedness" standard.

Except for vague, semantic similarities to the "work relatedness" concept, there is no indication in the lower court's decision that it applied a "work relatedness" test in determining the relationship between Consolidated Supply and Hoff Electric. Rather, the lower court favored the realistic approach used in *General Electric* and *Carrier Corporation* to identify the customers or suppliers who are legitimate objects of the union's appeal:

> Applying the principles underlying *General Electric* to the question of who is a 'supplier' or 'customer' to whom the pickets may legitimately appeal, we agree with the Board's rejection of any formalistic notion of legal ownership of materials delivered in favor of a more realistic analysis founded on the intended use of the supplies. Thus, if in fact and practice, Consolidated was delivering supplies which in the normal course of its business Hoff used and installed, Consolidated was a 'supplier' of Hoff, no matter where the legal title to the supplies might lie . . .[17]

The common sense, or empirical, definition of "supplier" is one that the participants (the primary and secondary employers and employees) readily observe

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[17]Pet. App. 15.

and use, whereas, the fact of legal title is not cognizable to those at the situs. In support of this realistic and proven approach the Court of Appeals cited *Carrier Corporation; Seafarer's International Union v. NLRB*, 265 F.2d 585 (D.C. Cir. 1959), and most on point, *Linbeck Construction Corp. v. NLRB*, 550 F.2d 311 (5th Cir. 1977). These cases eschew the significance of ownership for a variety of reasons fundamental to labor relations.

The dispositive issue of law in this case is whether at a construction site with a reserved gate system, any gate used for the delivery of materials and supplies for the use of the primary employer in its normal operations is subject to lawful picketing. The answer is well settled and is not in dispute here. *General Electric* is clear on the point that separate gates may not be used to insulate regular deliveries:

> . . . if a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion on traditional primary activity of appealing to neutral employees whose tasks are the employer's everyday operations.[18]

The principles which govern the operation of a "reserve gate" system have routinely been applied to

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[18]*Local 761, International Union of Electrical Workers v. N.L.R.B.*, 371 U.S. 667, 681 (1961).

suppliers of construction sites as well as to industrial plants.[19]

In *Carrier Corporation*, this Court reaffirmed *General Electric* and clarified its holding by concluding that ownership of the situs where the picketing occurs is not relevant to the legality of the picketing at a reserved gate.[20] In *Linbeck Construction Corp. v. N.L.R.B.*, the Fifth Circuit, following the same principle, rejected the contention that supplies owned by a third party, but destined for use by the primary employer, could be sheltered from picketing appeals. The Court stated:

> . . . (G)eneral contractors throughout the construction industry could stop a 'traditional goal of primary pressure' — halting the operations of the primary employer through the influence of a picket line on those suppliers who contribute thereto — by the simple expedient of retaining legal title to all materials to be used by the subcontractors.[21]

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[19]*District Council of Painters v. N.L.R.B. (Calhoun Drywall Co.)*, 361 F.2d 70 (D.C. Cir. 1966); *N.L.R.B. v. Nashville Building and Construction Trades Council*, 383 F.2d 562 (6th Cir. 1967); *Local 369, I.B.E.W. (Kelley Electric Co.)*, 216 N.L.R.B. No. 25 (1975), enf. 528 F.2d 317 (CA 6, 1976); *Iron Workers, Local 433 v. N.L.R.B. (R.F. Erection)*, 598 F.2d 1154 (9th Cir. 1979) (see cases cited therein at Part I).

[20]*Steelworkers v. N.L.R.B. (Carrier Corp.)*, 376 U.S. 492, 499 (1964).

[21]*Linbeck Construction Corp. v. N.L.R.B.*, 550 F.2d 311, 318 (5th Cir. 1977).

Thus, the appellate court's consideration in this case whether the materials were "essential to the primary employer's normal operations",[22] borrowed from the Fifth Circuit's analysis in *Linbeck Construction Corp.*,[23] relates to the supplier issue in a case where legal title or other factors may be distorted, and does not relate to the primary-secondary employer issue addressed by this Court's decision in *General Electric.* In sum, the *General Electric* test of work relatedness between employers is not at issue here since Consolidated's relationship with Hoff was vertical, not horizontal.

This approach is consistent with the traditional right of employees to appeal to suppliers not to deliver materials or goods to an employer engaged in a primary labor dispute. Clearly, the question of who is the supplier remains within the province and expertise of the Board. In this respect *Denver Building Trades* held:

> Not only are the findings of the Board conclusive with respect to questions of fact in this field when supported by substantial evidence on the record as a whole, but the Board's interpretation of the Act and the Board's application of it in doubtful situations are entitled to weight.[24]

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[22]Pet. App. 14.

[23]*Linbeck Construction Corp. v. N.L.R.B.*, 550 F.2d 311, 317-318 (5th Cir. 1977).

[24]*N.L.R.B. v. Denver Building and Construction Trades Council*, 341 U.S. 675, 692.

III. THIS CASE DOES NOT CONFLICT WITH ANY OTHER DECISIONS

The decision of the Court of Appeals in this case does not conflict with the decisions of the Sixth Circuit[25] or the Ninth Circuit[26] as suggested by Petitioner.

Respondent does not dispute, for purposes of this appeal, Petitioner's claim that the *General Electric* "work relatedness" test is broader than the independent contractor test of *Denver Building Trades*, and the former test may be inappropriate in the context of contractors on construction job sites. But, in this case, where the supplies were purchased by the owner-developer to be installed by Hoff, *Denver Building Trades* is not controlling, and other cases, including the *General Electric* case, are helpful in determining the vertical relationship between the supplier and the primary employer.

Since *Denver Building Trades* does not speak to the vertical supply relationship, there is no inherent conflict in deciding supplier relationships in a manner that is uniform and consistent between both industrial and construction job sites.

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[25] *N.L.R.B. v. Nashville Building and Construction Trades Council*, 383 F.2d 562 (6th Cir. 1967).

[26] *Carpenters Local 470 v. N.L.R.B. (Mueller-Anderson, Inc.)*, 564 F.2d 1360 (9th Cir. 1977).

CONCLUSION

There are no issues in this case which have not been resolved pursuant to the guidelines and principles set forth in previous rulings by this Court. The supposed tension between *Denver Building Trades* and *General Electric* is non-existent, and does not arise from the facts of this case involving issues of supplier/deliverymen. As such, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 20th day of March, 1981, three (3) true and correct copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit were served by depositing same in the United States mail with first class postage prepaid and addressed to: William R. Radford, Esq., Seyfarth, Shaw, Fairweather & Geraldson, One Biscayne Tower, 2 South Biscayne Boulevard, Miami, Florida 33131, and Wade H. McCree, Jr., Esq., Solicitor General, Department of Justice, Tenth and Constitution Avenue, N.W., Washington, D.C.

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